

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

EPIC GAMES, INC.,

Plaintiff, Counter-Defendant,

VS.

APPLE INC.,

Defendant, Counterclaimant.

No. 4:20-CV-05640-YGR-TSH

## **DECLARATION OF BENJAMIN SIMON**

Hon. Yvonne Gonzalez Rogers

## **DECLARATION OF BENJAMIN SIMON**

I, Benjamin Simon, declare as follows:

## I. Background

1. I am the President, Chief Executive Officer and Co-Founder of Yoga Buddhi Co, the company behind the Down Dog series of apps. I will refer to the company throughout this declaration as Down Dog, which is the public facing name of the business.

2. As President, I oversee the company's suite of consumer mobile and web apps for at-home fitness.

3. Down Dog is a non-party in the above-captioned action.

4. I submit this declaration in support of Epic Games, Inc's ("Epic") Motion to Enforce Injunction. The contents of this declaration are based on my personal knowledge. If called as a witness, I could and would competently testify thereto.

5. I provided testimony at the trial in this matter. (See Trial Tr. 349:5-420:5.)

6. I also provided testimony in Epic Games, Inc. v. Google, LLC. (See Dkt. 834,

7. Epic Games, Inc. v. Google, LLC., No. 3:20-cv-05671-JD (N.D. Cal.).

## II. Down Dog's Business

8. I co-founded Down Dog in 2015.

9. Down Dog has a family of six products, all of which are related to health and wellness and can be accessed through a single subscription. Our most popular product is a yoga app, but we also have apps for high-intensity interval training, meditation, running, barre and prenatal yoga. Across our products, we reach about 100,000 users per day.

10. Each of our products is accessible to users on three different platforms: as an iOS native app, as an Android native app, and as a web (i.e., browser-based) app.

11. Down Dog's business model is subscription-based. When a user downloads any one of our apps or visits our website, the user creates an account and then gains full access to all of our products, for free, for a 2-3 week trial (a customer's trial always ends on the 1st or the 15th of the month, whichever is further from their initial signup date). Following the trial period, if the user wishes to retain access to our products, they need to purchase a monthly or annual

1 subscription plan.

2       12. Under Apple's App Store Review Guidelines, our subscription plans are  
 3 considered digital goods or services. Accordingly, Apple requires that in-app payments for our  
 4 subscriptions must be processed by Apple's In-App Purchase ("IAP"), and Apple collects a fee on  
 5 each subscription payment of 15%-30%.

6       13. Because Apple charges Down Dog high fees to process payments for our  
 7 subscriptions, Down Dog charges lower prices for our subscriptions to users who complete their  
 8 purchase on our website, rather than within our iOS apps. Specifically, Down Dog charges users  
 9 \$7.99 and \$39.99 for a monthly or annual subscription, respectively, when it makes that sale on  
 10 our website; Down Dog charges users \$9.99 and \$59.99, respectively, when it sells them to users  
 11 within one of our iOS apps.

12       14. Down Dog typically offers a sale—discounted pricing—about four times a year.  
 13 When there is a sale, Down Dog typically charges users \$19.99 for an annual subscription  
 14 purchased through the Down Dog website. Due to the restrictions that Apple's policies place on  
 15 Down Dog and the associated fees, the price for a Down Dog subscription remains the same  
 16 within our iOS apps during sales and we cannot inform users within the app that there is a sale  
 17 taking place on our website.

18       **III. Down Dog Has Successfully Engaged in Steering on Android**

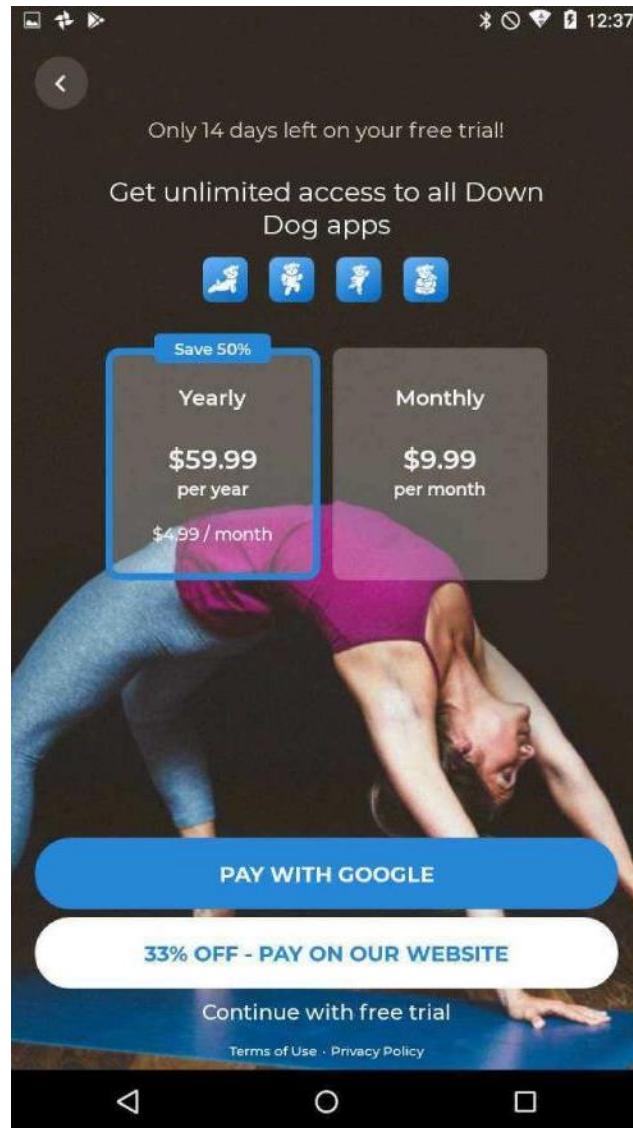
19       15. Prior to January 16, 2024, Apple prohibited Down Dog from telling our iOS users,  
 20 within the app, that they could obtain a subscription more cheaply on our website, as compared to  
 21 making an in-app purchase.

22       16. By contrast, prior to 2022, Google did not prevent Down Dog from informing its  
 23 Android users that they could pay less for our subscriptions by purchasing them on our website,  
 24 rather than within the app. Down Dog took advantage of that opportunity and included a button  
 25 within its Android native apps that informed users that they could purchase a subscription on our  
 26 website for as much as 33% less than what they would be required to pay to purchase the  
 27 subscription within the Android native app.

28       17. Figure 1 is an example of what Down Dog's Android apps looked like prior to

1 May 2022, when they included a button allowing a user to purchase a subscription on Down  
 2 Dog's website.

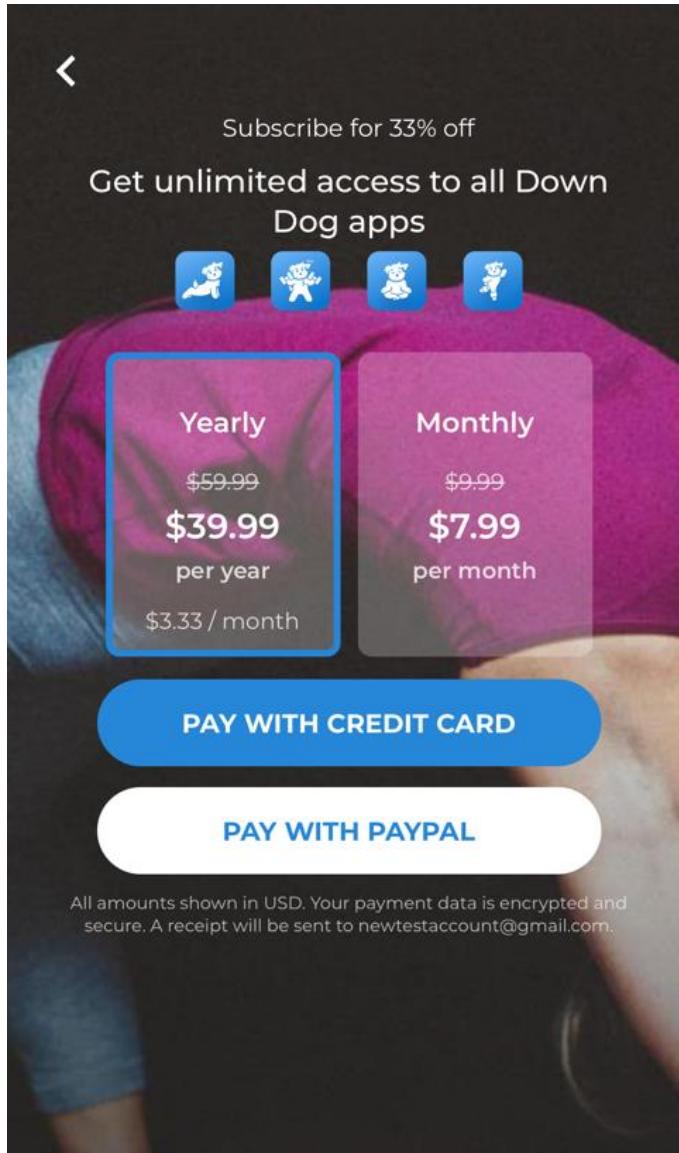
3 **Figure 1**



23 18. Users had to be logged in on the app in order to see this page. If users then  
 24 clicked on the “Pay On Our Website” button within the app, they were directed to a landing page  
 25 on Down Dog’s website using a unique URL linked to their account. This guaranteed that the user  
 26 was purchasing a subscription for the correct account. The user then had the option of paying for  
 27 their subscription on Down Dog’s webpage using PayPal or a credit card.

19. Figure 2 is an example of the page on Down Dog's website that users would be taken to if they clicked the button within the Android native app.

**Figure 2**



20. While the steering buttons were in place within Down Dog's Android apps, they proved highly effective in getting Android users to opt for the lower price available to them on Down Dog's website, instead of paying more by purchasing their subscriptions within the Android native app. Providing this option also increased the number of users subscribing overall, as detailed below.

21. Among Android users who purchased a subscription while there was a button

1 within the Android native app that took users to the Down Dog website, roughly 90% of users  
 2 chose to subscribe on our website, while only 10% chose to subscribe in-app.

3       22. In 2020 Google released what they described as a “clarification” of their policies,  
 4 making it clear that in the future, we would not be allowed to continue linking out to our website  
 5 for purchases. To determine the effect this change would have, we did an A/B test in the Android  
 6 apps to determine what effect removing the website purchase button would have. We found that,  
 7 among users who were not shown the website purchase button (i.e., who were shown what a  
 8 typical iOS app user would see), only about 50% of users who purchased a subscription did so on  
 9 the website, compared to about 90% who were shown the button. In both cases, users were  
 10 emailed about the website purchase option, which we believe is how the ~50% of users who  
 11 subscribed on our website were able to do so.

12       23. Further, during the same testing described above, Down Dog found that the overall  
 13 rate of subscriptions was 28% lower among the users who were not shown the in-app button to  
 14 purchase on our website. Users who downloaded the app and created an account were 28% less  
 15 likely to purchase a subscription at all, whether in-app or on our website, if they were not shown  
 16 the in-app button linking to the website purchase option.

17       24. As noted above, Down Dog removed the website purchase button for all users  
 18 when Google required it of us in May of 2022. Since then, the number of users choosing to  
 19 subscribe in-app versus on our website has been roughly 50/50, the same as in the experiment,  
 20 and also the same as what we see on iOS where we have never been allowed to have the website  
 21 purchase button in-app.

22 **IV. Apple’s New Policies Prevent Down Dog from Steering Users to Its Website.**

23       25. I understand that this Court’s injunction was intended to allow Down Dog to steer  
 24 its users to the cheaper purchasing options it offers on its website by using buttons, links or other  
 25 notices it could display within the app, as it previously had done within its Android apps.

26       26. Given the success of Down Dog’s steering within its Android apps, I was excited  
 27 about the implementation of the injunction and was looking forward to having Down Dog engage  
 28 in similar steering within its iOS apps, to the mutual benefit of Down Dog and its users.

1        27.     But Apple’s policies, as announced on January 16, 2024, prohibit the kind of  
2 steering Down Dog used in its Android apps and, unless changed, would completely prevent  
3 Down Dog from steering its iOS users, within the app, to purchase their Down Dog subscription  
4 from the Down Dog website, at a significant discount.

5        28.     First, Apple’s new policies prohibit the external purchase link from being  
6 “displayed on any page that is part of an in-app flow to merchandise or initiate a purchase using  
7 in-app purchase.” This means that Down Dog cannot present both options to the user on the same  
8 screen, as we did on Android. This very much inhibits our ability to give users a choice in how to  
9 subscribe, as we are not allowed to display all of the user’s options at once. Displaying the  
10 options on separate screens is also likely to lead to user confusion, as it suggests that the two  
11 options are unrelated offerings. There does not appear to be any justification for this requirement  
12 except to intentionally obfuscate the choice to users.

13        29.     Second, Apple requires that the external purchase link “be displayed no more than  
14 once in app, on no more than one app page the user navigates to (not an interstitial, modal, or  
15 pop-up), in a single, dedicated location on such page, and may not persist beyond that page.” This  
16 means that we cannot present the purchase page to users automatically, but would instead have to  
17 hope that users find it themselves from the menu in the app. Although the purchase page is  
18 accessible from the menu, over two thirds of users who subscribe in-app do so when the purchase  
19 page is presented as a “pop-up” after they create their account or after their trial has ended. Apple  
20 has no general restrictions against interstitials, modals, or pop-ups. They are allowed for in-app  
21 purchases using IAP, for purchases of physical goods not using in-app billing, and for pages that  
22 contain other types of links. This requirement therefore appears to only exist to handicap the  
23 external purchase option.

24        30.     Third, when users click the external purchase link, Apple will automatically  
25 display a warning screen discouraging users from making a purchase on Down Dog’s website.  
26 This screen warns users about security risks of purchases on Down Dog’s website and suggests  
27 that refunds will not be available. This is misleading, as Down Dog has never had a security  
28 incident related to website purchases. All payments on our website are processed with PayPal or

1 Stripe, two of the largest and most reputable payment processors in the world. Additionally,  
2 Down Dog issues refunds to any user who requests one within 30 days of their payment, a grace  
3 period that, ironically, is more generous than Apple's own 24-hour policy. The font size on this  
4 screen is also absurdly large, clearly intended to scare users, and goes against Apple's own design  
5 guidelines, which state: "Strive to maintain a minimum font size that most people can read  
6 easily," (as seen at <https://developer.apple.com/design/human-interface-guidelines/typography>).  
7 Apple displays no such warnings when users pay with a payment method other than IAP, such as  
8 PayPal or Stripe, for physical goods or services in-app. Clearly there are no additional security  
9 risks when purchasing digital goods vs physical goods, so again this appears to have no  
10 justification except to handicap the external purchase option.

11       31. Fourth, Apple requires the external link to use a single static URL, meaning that  
12 the link cannot take users to a page where they are automatically logged in to the correct account.  
13 As described above, this is different from the buttons that Down Dog previously included in its  
14 Android native apps. This is a serious problem because users sometimes unintentionally log in  
15 with a different email address than the email address they used inside the app. This can cause  
16 them to make a purchase for the wrong account and creates confusion when they return to the app  
17 and do not see or have access to their paid subscription. Without this requirement, we could  
18 easily link users to a page where they are guaranteed to be purchasing for the correct account.  
19 Apple has no general prohibition against dynamic links and we are allowed to provide other links  
20 in the app that are unique to the user in order to automatically log them in or provide similar  
21 functionality. This requirement therefore introduces the possibility that users make incorrect  
22 purchases for no apparent benefit except to further handicap the external purchase option.

23       32. Fifth, the fees that Apple charges on external or steered purchases would require  
24 Down Dog to raise its website prices to match those in-app, and even then, Down Dog would  
25 make less money on linked purchases than it would make on in-app purchases, thus removing the  
26 primary economic incentives for users to purchase externally, or for Down Dog to try to steer  
27 users to its website. Down Dog's website prices have always been lower than prices offered in its  
28 apps because we pay significantly lower processing fees for our website purchases: about 3.5-

1 6.5% for Stripe or PayPal payments on our website, versus the 15-30% fee collected by Apple for  
2 in-app purchases. This is why Down Dog currently offers a discount of 33% on purchases  
3 completed on our website. That discount is good for Down Dog and its users alike – users pay  
4 much less, and Down Dog sells more subscriptions. But under Apple's proposed policy, the fees  
5 collected by Apple would be only 3% less for purchases made on our website, as compared to the  
6 fees Apple charges for in-app purchases. Our actual collected revenue would therefore be lower  
7 for website purchase than for in-app purchases, even after raising the website prices to match  
8 those in-app. Although some users may simply prefer to use a credit card or PayPal instead of in-  
9 app billing, we have always assumed that the primary reason users choose to subscribe on our  
10 website is because of the reduced price, which we would no longer be able to offer under Apple's  
11 new policies.

12        33. Sixth, adding an external purchase link would require us to pay Apple's fees for  
13 website purchases that would have occurred even without the link. As stated above, roughly half  
14 of our iOS users subscribe on our website for a reduced price, even without the ability to steer  
15 from within the app. This is because we also email our users about the website purchase option,  
16 and it is also presented to them if they use the web app to practice. Apple's proposed policy would  
17 require us to pay their fee for any purchases that occur within seven days of a user clicking the  
18 external purchase link. This means we would end up paying the fee for many purchases that  
19 would have occurred even without the in-app link. This alone is enough reason for Down Dog to  
20 not even consider applying for the external purchase link entitlement.

21 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true  
22 and correct and that I executed this declaration on March 12, 2024, in San Francisco, CA.

  
Benjamin Simon

1 I, Gary A. Bornstein, am the ECF User whose ID and password are being used to file this  
2 Declaration of Benjamin Simon in Support of Epic Games, Inc.'s Motion to Enforce Injunction.  
3 In compliance with Civil Local Rule 5-1(i), I hereby attest that concurrence in the filing of this  
4 document has been obtained from the signatory.

5

6 /s/ Gary A. Bornstein

7 Gary A. Bornstein

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